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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 877

EDGAR L. SHOTT, JR., *Appellant*,

v.

STATE OF OHIO, *Appellee*.

On Appeal from the Supreme Court of the State of Ohio

APPELLANT'S BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS

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The brief filed by the State of Ohio in support of its motion to dismiss this appeal does not even attempt to meet the arguments made by the appellant and the cases cited in support thereof. Appellee's brief slides off the critical issue—whether *as applied* the Ohio Blue Sky Law statute was unconstitutionally vague—by stating the conceded fact that forty years ago the Act withstood a broad due process-interstate commerce challenge in an appeal from a state civil proceeding. *Hall* v. *Geiger-Jones Company*, 242 U.S. 539 (1922).

But there are no cases cited to support the peculiar interpretation of the securities law by the Ohio courts in this case which in effect makes a legitimate, single, private loan, which has been fully repaid, the basis of a criminal prosecution without any showing of guilt or improper intention on the part of the appellant. Nor has the State attempted to meet appellant's argument that the statute created an unlawful statutory presumption and unconstitutionally shifted the burden of proof to the defendant.

A. Appellee's Failure to Meet, Let Alone Rebut, the Substantial Federal Questions Raised in the Jurisdictional Statement

Appellee's peculiar interpretation of the Ohio Blue Sky Law, which we attack as unconstitutional in its application, may be summarized as follows:

(1) The Ohio courts here have held that a single transaction in which money is borrowed on a promissory note is sufficient to support a conviction under the Ohio Blue Sky Law for selling non-exempt securities. However, as we have shown on page 17 of our Jurisdictional Statement, no case in any jurisdiction, including prior cases in Ohio, has ever gone that far. In *all* previous prosecutions under state securities laws, without exception, there has been proof of repeated issues of promissory notes, fraud, or the promise of the future delivery of stock or equity interest.

(2) Although the Blue Sky Law explicitly requires a knowing and intentional sale of non-exempt securities in order to constitute an offense, the Ohio courts have construed the words "knowingly and intentionally" out of the statute. Such an interpretation makes the application of the Ohio statute here particularly susceptible to a charge of void for vagueness,

as we pointed out on pages 16-17 of our Jurisdictional Statement. Thus, every borrower who makes a single personal loan violates the Act even though he honestly believed that it was an exempt transaction; for this violation, the penal sanction imposed is a one to five year term in the penitentiary, not a mere fine as imposed in many "strict liability" criminal statutes.

This standard which makes such an innocent borrower guilty is, as we demonstrated in our Jurisdictional Statement, completely vague and indefinite. Nevertheless, under the Act as interpreted, the *borrower* must come forward with proof that such standard of guilt has *not* been met. If he shows that this particular loan was the only one he ever made, he clearly meets the burden of proof. But if he shows that he has ten or fifteen notes outstanding at banks or with private lenders, no one can tell whether or not the Act has been violated since the actual state of mind of the borrower is immaterial under the Ohio decision.

If the Ohio courts had required some sort of specific intent, a showing by the State that the borrower had obtained money from a large number of people might well be sufficient evidence of criminal intent to shift the burden of proof to the borrower to show that the transaction was actually a private one. But under the Ohio courts' construction of the law that entering into a single private loan transaction may be a violation of the Act even without any criminal intent, there is no possible standard set out in the Act or any benchmark whatsoever as to what would meet the burden of proof. Suppose that the borrower, who did not know that he was committing an offense under the Act, had borrowed money from a dozen people. Would this be an offense, or would it take more? No one can tell.

(3) Under the interpretation of the Act supplied by the Ohio court, the burden of proof to show that the transaction is exempt is not met when the borrower proves that it was merely a private loan. For, on this record which was held sufficient to support a conviction, there can be no possible question as to the appellant's showing that the single transaction on which the indictment is based was a private loan from an old friend. In spite of attempts by the prosecutor to make the witness say that he was "investing" in something called the Shott Investment Company, the witness refused to cooperate. He insisted that he did not go to appellant for the purpose of making an investment. He loaned the money to appellant solely because of the high interest rate offered and his belief in appellant's ability to repay the loan. We have printed the record in full. It affirmatively shows that the transaction on which the indictment was based was exempt under Ohio law. Sestito had dropped in to visit the appellant, and his sole purpose was to make a personal call. He testified:

> Q. Had you and Mr. Shott had any advance arrangements for your being there on the 28th day of September, 1960? A. No, sir, not that I can remember.
>
> Q. Had you telephoned to Ed? A. No, sir.
>
> Q. Or made any contact with him? A. No, sir, I just dropped in.
>
> Q. When you dropped in, was there any purpose for your dropping in on that date? A. Well, I mean no. I mean it was just more or less a personal visit. I just dropped in to see him. (Jurisdictional Statement, App. E. 13a).

Appellant asked the witness if he wanted to make some money. He offered to borrow from the witness any sum that the witness could conveniently loan at

an interest rate of twelve and a half per cent for sixty days:

> Q. Did he ask you for any money? A. Yes, he did.
>
> Q. Did he ask you for any particular amount? A. Well, he asked me how much I could come up with and, of course, I mean I told him I thought I could come up with a thousand, and then it sounded so good, I mean I come up with two thousand.
>
> Q. What sounded so good? A. Well, the percentage, twelve and a half per cent. (*Id.*, p. 14a).

The whole transaction was summarized by the prosecution's witness as follows:

> Q. Actually, when you went into Mr. Shott's office on the 28th of September, Mr. Shott told you that he would like to borrow some money from you, didn't he? A. That's right.
>
> Q. And he told you that he would give you twelve and a half per cent interest for the use of your money for 60 or 62 days time? A. That's right.
>
> Q. And you trusted Ed Shott? A. That's right.
>
> Q. And you trusted his ability to pay it back to you. A. Yes, sir, I did. (*Id.*, pp. 19a-20a).

What more is required to meet the burden of proof imposed by the statute than this testimony elicited on direct and cross examination of the prosecution's witness? It was on this uncontradicted testimony that counsel for appellant felt that he had fulfilled his burden of proof. We assert that from any rational point of view counsel was justified in resting his case at this point. Appellant's counsel had established that the money was privately borrowed from a friend and had been repaid. What more did the Ohio court think should be shown to meet the burden imposed by the

statute? The prosecutor, in the face of an objection which was overruled, insisted that appellant should have gone on the stand and told the jury that the transaction was "legal." This was the way he phrased it in his closing speech:

> "Edgar Shott says by his plea of not guilty that the State of Ohio, that's us, and you, cannot convict him of this crime. He never once told you that it was legal. He never once told you that it complied with the law. He just said, 'You can't get me; you can't convict me.' That is what he said.
>
> Now, if this were legal, if this were a promissory note, if it was legal when he issued it in September of 1960, isn't it just as legal today? It most certainly is. So I suggest to you, if it was legal and he thought it was legal in September of 1960, he thinks it's legal today; and if he thinks it's legal today, or yesterday, why doesn't Edgar I. Shott, why doesn't this Defendant, charged with these crimes, take that witness stand and tell you? Why doesn't he say, 'Members of the jury, I am a lawyer; I am a criminal lawyer that knows the law; I examined this law in September, and any other time that I had dealings, and I say it was legal, and I say to you today it was legal.' Why doesn't he do that if it was legal? Why doesn't he do that? No, he chooses to sit there; deny, yes, deny, that the state can convict him. But will he look you in the eye; will he stand up and say to you 'Members of the jury, what I did was proper?' He will not. He has not. He refuses to. At this point, he will not stand up and tell you. Why won't he tell you? Because it's illegal today, and it was illegal in September of 1960.
>
> Do you think this is a single transaction? Do you think this is the only time this occurred; that

this piece of paper, this security, was sold by Ed Shott? You have heard evidence of one—

Mr. Lloyd: I will object to that, your Honor.

The Court: Objection overruled." (Tr. Trans., pp. 49-50).

What kind of a definite standard of guilt is this? The answer is that it is no standard at all. Yet the prosecutor insists, and the Ohio courts apparently agree with him, that this was a perfectly proper standard on which to impose a one to five year sentence in the penitentiary on a lawyer who had done nothing more than borrow money from a friend and who established through cross-examination that this was a fully-repaid private loan. Under these circumstances the presumption of innocence is clear. If the State had evidence that the private loan shown on this record was part of a public offering of some kind, no competent prosecutor would have rested his entire case on an obviously innocent transaction. The fact that the State did not produce evidence of other transactions in the nature of a public offering, and instead rested the prosecution on a promissory note that had been fully repaid, clearly supports the inference there was no such evidence.

Thus, in the absence of any explicit evidence of an unregistered public offering, appellant's conviction became possible only by means of a statutory presumption which escalated evidence of the single, innocent and exempt loan transaction into proof of an unlawful, unregistered general offering of securities to the public. Its use here violates due process, because the presumption is totally irrational and wholly unsupported in common experience. Jurisdictional Statement, pp. 20-22.

And thus appellant finds himself trapped, his career ruined, facing probable disbarment proceedings and a term in the penitentiary for a major crime, because his counsel believed that an uncontradicted showing that the single promissory note was nothing more than evidence of a private loan from a friend was clearly sufficient proof that the transaction was exempt under the Ohio Blue Sky Law.

In sum, we submit that the Blue Sky Law, as applied here, was unconstitutionally vague because it provided appellant with no notice that his conduct was unlawful; that an innocent and commonplace transaction, such as borrowing money on a promissory note, cannot be made the basis of a presumption that a single private loan is part of a criminal transaction; and finally, that on this record, it was a deprivation of due process to place the burden of proof on appellant. We further submit that the burden of proof has been fully met here and that any additional evidence which the Ohio courts deem necessary to fulfill that burden is so vague and uncertain that it cannot be the basis of a criminal conviction.

All these federal questions are substantial. On this basis defendant's motion to dismiss should be denied and probable jurisdiction noted.

B. Appellee's Distortion of the Record

It is apparent from the motion to dismiss that the appellee must realize the weakness of its legal position, because there is an attempt to distort the record so that it appears that *some* evidence of a public offering of appellant's promissory notes may be inferred from witness Sestito's testimony. A reading of the evidence, the transcript of which we have printed in our Juris-

dictional Statement, will demonstrate that the State neither proved nor attempted to prove more than the single, private Sestito promissory transaction. Nevertheless, on pages 4 and 5 of appellee's brief we find this highly inaccurate summary of Sestito's testimony:

> "Patrick Sestito, a resident of Cincinnati, Ohio, testified that he, in the latter part of the summer of 1960, heard about investment opportunities with the Appellant from certain car dealers on Reading Road (T-27). On September 28, 1960, Sestito had two thousand ($2000.00) dollars in his pocket and went to Appellant's law office. He had not been in previous contact with Appellant, nor had he been contacted by Appellant in any manner. Sestito and Appellant had a discussion about the investing of Sestito's money in buildings and financing (T-18, 19). At that time Appellant explained the workings of the Shott Investment Company and showed Sestito a draft of the progress and development of the Shott Investment Company. Although intending only to invest one thousand ($1000.00) dollars, Sestito delivered over two thousand ($2000.00) dollars to Appellant because 'it sounded so good.' (T-20). Sestito was satisfied with the 12½ per cent profits for 60 days, which Appellant offered him. Upon payment to him of the money, Appellant presented Sestito with a promissory note (T-21). . . ."

1. The first three sentences of the above summary attempt to give the impression that Sestito had never been in previous contact with the appellant, that he had heard about investment opportunities which appellant was offering and went to appellant's office to take advantage of them. To the contrary, the record unambiguously shows that Sestito was an old friend and client of appellant and that he was merely making a social call on appellant on the day in question. (Ap-

pellant's Jurisdictional Statement, App. E, 12a, 15a). When the prosecution tried to get Sestito to say that he went to the office for the purpose of lending money to appellant, the witness denied any such purpose.

> Q. Was that part of the money you had in your pocket?
> A. Yes, sir.
> Q. Was that the reason you went to that office?
> A. Well, I mean not necessarily. It was just more or less, you know, just a social call, just to stop in and say hello. (Jurisdictional Statement, App. E, 15a).

2. The balance of the statement is an even worse distortion of the evidence. Appellee's contention that appellant explained to Sestito the workings of the Shott Investment Company as an inducement to loan money has no basis in the record. As we pointed out in our opening brief, the Company was a partnership formed by appellant for completely legitimate tax purposes. Jurisdictional Statement, p. 7, note 6. The only further explanation of the Company is contained in this excerpt of the record:

> Q. And what was it that Mr. Shott told you about the company and the investments that were being made?
> A. Well, I mean, of course, naturally I asked him if I could check it out and, of course, knowing Mr. Shott I figured, you know, it would be, you know, a pretty sound investment when he mentioned, you know, like investing it in buildings and financing. I know finance companies make a lot of money. I do know that.
> Q. Did he say who was investing it in buildings and financing and making a lot of money?
> A. No, sir, he didn't state that. (*Id.*, pp. 13a-14a).

It should be emphasized that there was not one word in the record about "the investing of Sestito's money in buildings and financing," as asserted by appellee. To the contrary, Sestito said that he loaned appellant money because of the interest rate and that for security he relied solely on the personal credit of appellant. He neither thought he was getting nor attempted to secure an equity interest in any construction or finance firm; he was making a single personal loan.

3. Appellee goes on to say that Shott showed Sestito a "draft of the progress and development of the Shott Investment Company." There is no such evidence. When the prosecuting attorney attempted to show that Sestito relied upon an alleged progress report of the Company, Sestito clearly negated any inference that he was moved by any report. Apparently, what was handed the witness was not a progress report but merely a credit statement. The witness disregarded it because he had faith in Appellant Shott's ability to repay the loan; it was solely on Shott's reputation and credit that Sestito loaned him the two thousand dollars. (Jurisdictional Statement, App. E, 19a-20a). The testimony on the credit statement is as follows:

> Q. Let me ask you if in the course of your conversations about the Shott Investment Company, that you had with Mr. Shott on that day in his office, he showed you anything about the company?
>
> A. Well, yes, he showed me, oh, I don't know what you would call it. An eight and a half by eleven stationery, plaque more or less, showing about these Shott investments.
>
> Q. What do you mean showing about the Shott investments?
>
> A. Of course, I couldn't read it. I couldn't remember it. It told about the company, Shott's investments.

Q. Did it have writing or figures or what did it contain?

A. Well, it just stated, you know, like—told about the company, like it's been in effect since—of course, I couldn't remember the date. I think it said something like 1955.

Q. Did it say anything about the investments that were being made?

A. Well, sir, I can't remember that. I just glanced at it and didn't study it too much.

Q. After you read that, did Mr. Shott make any other explanations to you about how the company operated or what was happening to the money?

A. No. Of course, he specified to report it to the—of course, I asked him—of course, I figured it was legitimate because I mean he being a lawyer, it was straight up and down. And he says report it to the income tax. And, of course, naturally when he said that I figured it was all right. (Jurisdictional Statement, App. E, 14a-15a).

4. Appellee's distorted summary of the record attempts to convey the impression that it was after reading from a "prospectus" of the Shott Investment Company that Sestito determined to double the loan which he intended originally to make. In the first place, as we pointed out above, there was no evidence of, nor was there in fact, any "prospectus." Further, no written document of any sort induced Sestito to loan money. Nevertheless, appellee asserts: "Although intending only to invest one thousand ($1000.00) dollars, Sestito delivered over two thousand ($2000.00) dollars to Appellant because 'it sounded so good.'" The "it" in appellee's brief clearly refers to the alleged prospectus. The inexcusable character of this distortion of the record is shown by the following excerpt which demonstrates that the "it" does not refer to some

alleged "prospectus" but to the interest rate which Appellant Shott offered to Sestito.

Q. Did he ask you for any particular amount?

A. Well, he asked me how much I could come up with and, of course, I mean I told him I thought I could come up with a thousand, and then it sounded so good, I mean I come up with two thousand.

Q. What sounded so good?

A. Well, the percentage, twelve and a half per cent. (*Id.*, p. 14a).

Sestito's testimony in this case is only a few pages long. We have printed it in its entirety. Although appellee has scattered through his brief inflammatory mischaracterizations like "prospectus" and "investing in buildings and finance," reference to the record will amply demonstrate that the transaction was, as we have asserted, nothing more than a single, innocent, exempt personal loan which has been fully repaid. As we pointed out in our Jurisdictional Statement, this single event has never, and cannot constitutionally, constitute the criminal "sale of a security" or criminally "dealing in securities" within the terms of the Ohio Blue Sky Law. Nor can this innocent, exempt conduct serve as the basis of a presumption of a criminal offering of unregistered securities or serve to shift the ultimate burden of proof to the defendant in this criminal case. All these issues present substantial federal questions.

C. Conclusion

For the reasons stated above, this Court should deny Appellee's Motion to Dismiss and should note probable jurisdiction.

Respectfully submitted,

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